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EX PARTE OR LATE FILED

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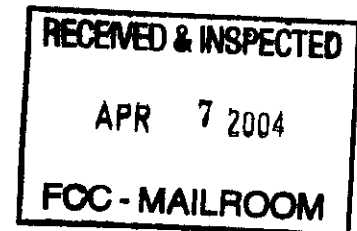
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March 31, 2004



Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th St., S.W., TW-A325
Washington, D.C. 20554

Re: EX PARTE VIA ELECTRONIC SUBMISSION
In the Matter of Rules and Regulations Implementing the Telephone
Consumer Protection Act of 1991; Report and Order; CG Docket No. 02-
278

Dear Ms. Dortch:

On Tuesday, March 30, 2004, from approximately 3:30 p.m. to approximately 4:10 p.m., representatives of Staples, Inc. participated in an *ex parte* telephone conference with Erica H. McMahon, Richard D. Smith, and Genaro Fullano of the FCC's Consumer & Governmental Affairs Bureau. Participating in the telephone conference from Staples's corporate headquarters were Peter Howard (Vice President, Marketing – Staples Business Delivery (SBD)); John Giusti (Director, Customer Sales & Marketing – SBD); Karin Vaccarezza (Affiliate Marketing Manager – SBD); Robert Molloy (Vice President/Assistant General Counsel – Legal Department); and Perry Wu (Litigation Counsel – Legal Department). Also participating from their respective locations were Mark Lefkow of Nall & Miller LLP; Brandon Fernald of Fulbright & Jaworski L.L.P.; and Fredrick McClure of Piper Rudnick LLP, all of whom represent Staples in pending litigation under the Telephone Consumer Protection Act of 1991 (TCPA).

Peter Howard opened the discussion by providing the FCC representatives with an overview of SBD and its recent facsimile advertising efforts. Mr. Howard emphasized that SBD has, at all relevant times, relied on and complied with the FCC's rules, which allowed (and still allow) senders to transmit fax advertisements to recipients with whom they have an "established business relationship."

Perry Wu then provided the FCC representatives with an update on the class-action and individual lawsuits that have been instituted against Staples since the middle of 2003. These

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lawsuits revolve around the allegation that Staples sent “unsolicited” fax advertisements in violation of the TCPA. Some of these lawsuits also involve claims under state consumer protection statutes and state-law tort theories. These lawsuits have challenged the validity of the “established business relationship” defense – a defense that has been repeatedly and consistently articulated by the FCC for more than a decade. The lawsuits have caused Staples to incur significant legal expenses and, as Peter Howard explained to the FCC representatives, have “chilled” Staples’s fax advertising efforts.

During the remainder of the telephone conference, Mark Lefkow and Perry Wu suggested ways in which the FCC could play a more active role in assisting companies which, like Staples, have been sued under the TCPA as a result of their good-faith reliance on and compliance with the FCC’s “established business relationship” defense.

First, Mr. Lefkow pointed out that class-action lawsuits might not be an appropriate vehicle for TCPA claims. Mr. Lefkow observed that the statutory damages imposed by the TCPA were intended to encourage consumers who had received “unsolicited” fax advertisements to pursue their claims in small claims courts (or their equivalent). Mr. Lefkow stated that it is far from clear that Congress intended to have TCPA claims litigated on a class-wide basis. Mr. Lefkow noted that the Federal Truth in Lending Act, which imposed similar civil penalties, was consistently interpreted by federal courts not to allow for class-action lawsuits until the statute was amended by Congress to specifically provide for such suits.¹ During the course of this discussion, the FCC representatives pointed out that the FCC’s rulings can only be challenged in accordance with the Administrative Procedures Act.

Second, Mr. Lefkow and Mr. Wu stated that the FCC’s “established business relationship” defense is currently under attack in each of the cases involving Staples and is presently subject to vastly different interpretations in the courts of all fifty states and the District of Columbia. To date, companies like Staples have had to defend the FCC’s “established business relationship” defense on their own. Mr. Lefkow, Mr. Wu, and Mr. Molloy asked whether the FCC might, in the appropriate circumstances, enter formal appearances in specific cases and submit concise briefs on the “established business relationship” defense. The FCC representatives observed that the FCC “may, on occasion, get involved” in specific cases but that all such decisions are made by the FCC’s Office of General Counsel.

¹ 15 U.S.C. § 1640(a); Kruger v. European Health Spa, Inc., 56 F.R.D. 104 (E.D. Wisc. 1972) (given the “possibly annihilating punishment, unrelated to any damage I doubt that Congress intended such a result”), Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412, 416 (S.D. N.Y. 1972) (same); Kline v. Coldwell, Banker & Co., 508 F.2d 226, 234-35 (9th Cir. 1974) (same); Wilcox v. Commerce Bank of Kansas City, 474 F.2d 336, 341-47 (10th Cir. 1973) (same); In re Trans Union Corp. Privacy Litigation, 211 F.R.D. 328, 348-51 (N.D. Ill. 2002) (same); Berkman v. Sinclair Oil Corp., 59 F.R.D. 602, 608-09 (N.D. Ill. 1973) (same); Act of October 28, 1974, Pub. L. 93-495 (amending the TILA to specifically provide for a class action). See 18 FCC Rcd 14014, 14136, ¶ 206.

Ms. Marlene Dortch
March 31, 2004
Page 3

Finally, Mr. Wu remarked that the legal uncertainty surrounding the FCC's "established business relationship" is perhaps best exemplified by the FCC's webpage on "Unwanted Faxes: What You Can Do." Prior to the Fall of 2003, this webpage properly acknowledged the existence and viability of the "established business relationship" defense. But sometime in the Fall of 2003, the FCC modified the webpage by eliminating all references to the "established business relationship" defense and reciting the "signed written consent" requirement of the recently amended fax advertising rules (which are not scheduled to go into effect until January 1, 2005, at the earliest) as if the requirement were already in effect. The FCC representatives replied that they would "take a look" at this issue.

An original and one copy of this letter are being submitted to the Secretary of the FCC.

If there are any questions regarding the foregoing, please do not hesitate to contact the undersigned.

Sincerely,

s/Mark D. Lefkow
Mark D. Lefkow
Nall & Miller, LLP



cc: Gene Fullano
Erica McMahon
Richard Smith